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SUPREME COURT NO. 97148-0

NO. 35428-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMIE HUGDAHL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Scott R. Sparks, Judge

RESPONDENT'S REPLY TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by the Kittitas County Prosecuting Attorney's Office.

B. COURT OF APPEALS DECISION

Appellant has correctly pointed the Court to the opinion before the Court.

C. RESPONSE TO ASSIGNMENT OF ERROR

1. Because the charging documents in this case were complete and included the necessary elements to provide the Appellant, Hugdahl sufficient notice of the charges and enhancements levelled against her to allow her to prepare a defense, the Appellant was not deprived of her constitutional right to adequate notice of the criminal allegations against her.

Response to Issue Pertaining to Assignments of Error

Hugdahl was not deprived of her constitutional right to adequate notice of the criminal allegations against her based upon a scrivener's error that was not caught and corrected. Hugdahl did not seek a Bill of Particulars from the state at a time when such could have been addressed; did not move for dismissal at a time when the error could have been corrected; and counsel's cross examination of the defense witnesses indicated that sufficient notice had been presented by the charging documents. Hugdahl's assertion as to why no defense to the aggravator was mounted is unpersuasive given the context of the case (Claim is she did not mount a defense to the aggravator because there was no such aggravator as a delivery within 1,000 feet of a school bus route). Hugdahl's strategy was not so much of a contestation of the evidence of the crimes and enhancements, as it was focused upon creating the affirmative

defense of entrapment, which was a sound trial decision given the weight of the evidence against her, including reference to a school bus unloading children at the time of one delivery.

STATEMENT OF THE CASE:

1. Procedural Facts:

Hugdahl's statement of procedural facts is mostly sufficient, but is in need of some augmentation. Respondent has reviewed the Court file and has located no document or court notation indicating that Hugdahl ever requested a Bill of Particulars in this matter. Hugdahl did file an additional Demand for Discovery on June 8, 2017 CP 26 but that related to obtaining information concerning the confidential informant. Respondent has reviewed the Court file and has located no document or court notation indicating that Hugdahl ever moved to dismiss the charging for school bus route stop enhancements based upon defective charging, missing elements, or lack of notice of the charges or enhancements levelled.

2. Substantive Facts:

Appellant's statement of Substantive Facts is mostly sufficient, and mostly accurate, although most are unnecessary to the review of the issue before this case. The only witness to testify about school bus route stops was John Landon who worked for the Ellensburg School District. The first question he was asked after identifying where he worked and his title was whether the school district uses a mapping system to map their school bus stops, to which he answered affirmatively. RP 196. He indicated that they use the maps to plot the stops and get their locations. RP 197. He indicated that the software can assist in determining how many bus stops are within an area. RP 197. He testified to an exhibit and that it showed two of the school district bus stops used to unload and load children. RP 197. When discussing the exhibit with

the jury he spoke about triangular shapes representing their bus stops, and placed two of them within 1,000 feet of Safeway. RP 198. And he testified that those two school bus stops existed in January of 2017. RP 200. Hugdahl's cross-examination commenced with asking if he used any other means of measuring the distance from 5th and Ruby (location of Safeway) "to these bus stops?" RP 200. Later, the witness was asked on cross if there was anywhere within the City of Ellensburg that was not within a thousand feet of a school bus stop, and provided the answer that the only location was Fred Meyer. RP 201.

During closing argument the state indicated that the crimes took place within a thousand feet of two different school bus stops. RP 340

During closing arguments, Hugdahl immediately launched into the entrapment defense talking about what people in desperate situations do that they would not otherwise do and that this is what the case was about. RP 347 Most of the closing was about the CI and why Hugdahl was afraid of him causing her to do what she did, specifically stating that "Jamie did what she did because she was afraid of him, and she couldn't turn him down. RP 353 Hugdahl barely referenced the crimes at all in closing and did not go into any specifics in denying any elements of the crimes or the enhancements, basically arguing only that these crimes were done because of the fear that Hugdahl had of the CI which equates to entrapment. RP 347-355.

During rebuttal closing, the state again addressed the entrapment defense, addressed the jury instructions, drugs, dates and that the occurred within a thousand feet from two different school bus stops. RP 355-356

3. Court of Appeals

Hugdahl was tried on four unlawful drug delivery charges, one each for Heroin, Methamphetamine, Alprazolam and MDA. Hugdahl testified, admitting she delivered the drugs,

but claimed she was entrapped by law enforcement into doing so. The jury found Hugdahl guilty, and also found that as to each delivery that they occurred within 1,000 feet of a school bus route stop under RCW 69.50.435 as properly instructed by jury instructions provided by the Court.

Hugdahl challenged her convictions at the Court of Appeals on two grounds:

- 1) That the charging information was defective in putting her on notice of the charges (enhancements) because the missing word “stop” deprived her of the ability to know what she was defending against (did not defend against the enhancement because no such enhancement existed); and
- 2) That the jury instructions were defective in allowing her to argue for a defense of entrapment. Hugdahl has dropped the second issue and only raised the lack of notice at this Court.

As to the first issue, Hugdahl challenged the adequacy of the charging language because the sentencing enhancement allegation was required to state “school bus route stop” but omitted the word stop. CP 1-2, 5-6, 58-59 Hugdahl argued that language failed to adequately advise her of the elements of the sentence enhancement, but the Court of Appeals majority opinion felt that she received adequate notice to defend against the charges. The Court of Appeals opined that the defendant was given sufficient notice because she was put on notice that the crime occurred within 1,000 feet of a bus route and that bus route included bus stops, and thus a liberal construction as required by case law applied to find that the charging language included sufficient notice to the defendant of what was charged.

B. ARGUMENTS:

1. **Appellant was not deprived of her constitutional right to adequate notice of the criminal allegations against her based upon a scrivener’s error that was not caught and corrected.**

The argument presented is phrased in terms of procedural due process found in the 5th and 14th Amendments to the United States Constitution and in Article I, §§ 3 and 22 of the

Washington State Constitution. It has been said that the purpose of the due process clauses is not to protect an accused against a proper conviction but against an unfair conviction. *Palko v. Connecticut*. 302 U.S. 319, 58 S. Ct. 149, 82 L.Ed. 288 (1937). Put differently, a person is not entitled to a perfect trial only a fair trial, and several cases have discussed this concept. But the discussion must be put into context.

A defendant who is charged with a violation of RCW 69.50.401 is eligible to have their sentence enhanced if the violation occurs in or on certain public places or facilities as enumerated in RCW 69.50.435(1).

- (1) Any person who violates RCW 69.50.401 by manufacturing, selling, **delivering**, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:
 - (a) In a school;
 - (b) On a school bus;
 - (c) **Within one thousand feet of a school bus route stop designated by the school district;**
 - (d) Within one thousand feet of the perimeter of the school grounds;

RCW 69.50.435(6) provides definitions for “School”; “School bus”; and “School bus route stop”.

- (6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:
 - (c) **"School bus route stop" means a school bus stop as designated by a school district;**

The original Information in this case was filed on March 16, 2017. CP 1-2 At that time appellant was charged with 4 counts of Delivery of a Controlled Substance in Violation of RCW 69.50.401(1) and (2)(d). As to each count, the state alleged an aggravating circumstance, using the following language:

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant did violate RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under that subsection by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana, to a person within one thousand feet of a **school bus route** designated by the school district in violation of 69.50.435.

The Information was amended several times, for various reasons, but in each amendment the word “stop” was not included: CP 5-6 ; CP 45 – 46; and CP 58-59. Appellant argues that the information in this case was constitutionally insufficient because the state failed to catch an omission: Instead of a providing the complete statement for the aggravated sentence, within one thousand feet of a school bus route stop designated by the school district, the various informations omitted the word “stop”. Appellant claims that this omission deprived her of constitutionally required notice of the elements of the crime, and therefore, she had no reason to defend against that allegation (and presumably implies did not?). Appellant also contends under the liberal standard that is applicable, that the “stop” element cannot be reasonably implied from any of the charging language.

What is being addressed in this argument, and what the case law has long focused upon, is whether or not the charging language used sufficiently apprises an accused, with reasonable certainty, the nature of the accusation against that person, to the end that the accused may prepare a defense.. *State v. Leach*, 113 Wn.2d 679, 688, 782 P.2d 552 (1989). The State does not disagree with the legal standards as put forth by Appellant.

The State does, however, disagree with the conclusions reached by the Appellant, in that it is the state’s position that all of the essential elements of the crime were included within the charging document, either explicitly or implicitly. The State disagrees that the Appellant was not placed on notice by the charging document of the crimes and enhancements that were being

alleged. Appellant is asking this court to overturn the jury's verdict finding the aggravating circumstances to be present because of the logic that the omission of one word, from an entire phrase that otherwise apprised the Appellant of the element to be proven and charged, was missing.

The parties are in agreement that the case law requires a liberal interpretation of the charging document as no objection was raised to the wording until appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Under a liberal standard of review, the appellate court undertakes a two-pronged inquiry: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Kjorsvik*, 117 Wn.2d at 105-106. This test was adopted to address the challenges to the administration of justice that might occur from waiting until after a verdict was rendered, while providing defendants with ample protections even when raising the challenge for the first time on appeal. *Kjorsvik*, 117 Wn.2d at 104-106. This impetus for a liberal interpretation was stated somewhat differently in *State v. Nonog*, 169 Wn.2d 220, 226-227, 237 P.3d 250 (2010):

“Liberal construction balances the defendant’s right to notice against the risk of what Professor Wayne R. LaFave termed ‘sandbagging’ – that is, that a defendant might keep quiet about defects in the information only to challenge them after the State has rested and can no longer amend it. (citations omitted) When a defendant challenges the information for the first time on appeal, we determine if the elements “appear in any form, or by fair construction can they be found, in the charging document.” (citations omitted) We read the information as a whole, according to common sense and including facts that are implied, to see if it “reasonably apprise[s] an accused of the elements of the crime charged.” (citations omitted) If it does, the defendant may prevail only if he can show that the unartful charging language actually prejudiced him.

Under the *Kjorsvik* test, however, if the necessary elements are not found or fairly implied, prejudice is presumed and the case is reversed without reaching the question of prejudice found in the second prong. *State v. McCarty*, 140 Wn.2d 420, 426, 998 P.2d 296

(2000). As it relates to the prejudice prong, not only is the entire document available for review, but the court is not limited in determining prejudice or lack of prejudice from the document. A court is allowed to look outside the information to determine whether a defendant suffered actual prejudice, noting that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges. *State v. Williams*, 162 Wn.2d 177, 186, 170 P.3d 30 (2007)

Because Appellant has cited several cases in support of her position, it is worth discussing at least briefly what the errors were in some of those cases, and the conclusions reached by the Courts.

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) (Argued information constitutionally insufficient in charging first degree robbery with deadly weapon enhancement because omitted common law intent element of robbery – held that the information, although missing the nonstatutory element of intent to steal, did sufficiently inform defendant of all of the elements of robbery and no prejudice.);

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989) (This was a consolidation of two cases: one case brought by a convicted defendant and one case brought by the state following dismissal of case. The Court found the one case properly dismissed because the charging instrument did not specify the time, place, person, or property involved. The Court upheld the conviction in the other case despite an improper/incorrect code citation [11560201c versus 11.56.020(A)(1)(c) (correct code)] and use of “DWI” instead of correct statutory verbiage Driving While Under the Influence of Intoxicating Liquor and/or Drugs);

State v. McCarty, 140 Wn.2d 420, 426, 998 P.2d 296 (2000) (Information charging conspiracy to deliver a controlled substance failed to set forth essential common law element of third person outside agreement to deliver drugs, prejudice presumed, reversed);

State v. Nonog, 169 Wn.2d 220, 237 P.3d 250 (2010) (Argued information constitutionally defective because the information did not specify the underlying domestic violence crime the victim attempted to report – The information as a whole reasonably apprised the defendant of the underlying crime because of a reference to other charged crimes in information [reference to “ a crime of the same or similar character and based on the same conduct as another crime charged herein];

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Held to be a sentencing error not a charging error. State alleged armed with a deadly weapon, jury instructions/special verdict asked for finding as to deadly weapon; trial court sentenced based upon evidence of firearm to firearm enhancement period as opposed to deadly weapon enhancement period – 1 year versus 3 years. Was considered in terms of notice, in that defendant was never put on notice facing a firearm enhancement).

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995) (State failed to include element of premeditation from attempted murder charge and allowed to amend information after closing – Dismissal without prejudice because violated defendants constitutional right to be informed of the nature of the offense charged.); and

State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007) (Argued that information not sufficient for not alleging underlying crime for bail jumping, which impacts sentencing. Court held information put the defendant on notice that he faced a charge of felony bail jumping and because information accompanied by statement of probable cause, he had not been actually prejudiced).

The liberal construction standard applies in this case, because there was no challenge to the information until after conviction. In this case, the information contains the necessary facts in some form, or by fair construction, to put the defendant on notice of the allegation of an aggravating circumstance. Stated, differently, this Court in reading the information as a whole, and applying common sense and including facts that are implied, should determine that the information reasonably apprised the appellant of the necessary elements of the aggravating circumstance alleged and proven at the trial court.

a. Appellant did not seek a Bill of Particulars from the state at a time when such could have been addressed;

The language used in the charging language was statutorily correct, but for the omission of one word from the sentence providing the element. It is clear from the language that we were discussing a violation of RCW 69.50.401 because each aggravating circumstance was tied to a specific allegation of that RCW. And each discussed the factual basis of an intentional delivery of a particular controlled substance. And the language used the proper citation to the aggravating

circumstance, RCW 69.50.435, the proper distance, one thousand feet, and whom must designate the school bus route stop. The only omission is the scrivener's error of not including the word stop.

However, when we are discussing notice, and apprising a defendant of what they are to defend against, there is sufficient information to conclude, explicitly or implicitly, that the charging document provided constitutionally sufficient notice. A defendant, or an attorney for the defendant who had handled many cases as the defense attorney and deputy prosecutor in this case could surely make the connection that there was an aggravating circumstance alleged by the language. The attorney with such experience most likely was aware of the "stop" requirement as most assuredly was the deputy prosecutor who prepared correct jury instructions.

Verdict Form A-1; WPIC 50.61 Enhanced Sentence – Controlled Substance Violations Under RCW 69.50.435 – No Statutory Defense – Special verdict; CP 38;
Verdict Form B-1; WPIC 50.61 Enhanced Sentence – Controlled Substance Violations Under RCW 69.50.435 – No Statutory Defense – Special verdict; CP 40;
Verdict Form C-1; WPIC 50.61 Enhanced Sentence – Controlled Substance Violations Under RCW 69.50.435 – No Statutory Defense – Special verdict; CP 42; and
Verdict Form D-1; WPIC 50.61 Enhanced Sentence – Controlled Substance Violations Under RCW 69.50.435 – No Statutory Defense – Special verdict; CP 44.

If Hugdahl was confused by the charging language, she could have resorted to a review of the RCW. Hugdahl implies in argument that she did not mount a defense because she was of the opinion that no such enhancement existed. This implies that it was a tactical decision, which most likely could only have been made after reference to the statute to determine that a word was missing. The cases that speak to applying a liberal standard do so noting that there are several places and tactics that can be employed, such as seeking a bill of particulars to determine and force the state to address deficiencies that are observed.

- b. Counsel's cross examination of the defense witness indicated that sufficient notice had been presented by the charging documents.**

This argument, lack of notice also is unsupported if one think about the line of questioning concerning the only witness to testify about the school bus route stops. Both counsel used the full term in questioning the school district witness. If Counsel (at the time of trying the case as opposed to after conviction and looking for errors to raise on appeal) had felt that, or was confused by the charging language, would he have and would the deputy prosecutor has used the full term bus route stop when questioning on this issue during examination at trial? When we are talking about due process and adequate notice, it is not done in a vacuum, it is done within the context of the case, and in this case, as defense acknowledge in closing argument, there defense was not about the school bus route stop, or even the delivery of drugs – their sole focus was upon entrapment. Lack of notice is an issue latched upon by an appellate counsel after the fact trying to point to errors that no one at trial considered as an impediment to a fair trial.

c. Appellant did not move for dismissal at a time when the error could have been corrected.

If counsel believed that there was an improper charging of the enhancement, why was a motion to dismiss not made when the state rested? Such a motion is a tool mentioned in case law as a point where if raised at the trial court the issue can be addressed and argued at the time. Given the argument of Hugdahl on appeal, that she did not think such an enhancement existed, would she not have made such a motion to dismiss if that was in fact what they believed at the time of trial? There would be no prejudice to her, as such a motion would be made outside of the presence of the jury. They would not know that she made such a motion, and could not consider it in weighing her entrapment defense. Again, common sense tells us that adequate notice was

given, that it was not a concern at trial, and that all parties were tracking what the enhancement consisted of at the time of trial.

At a minimum, given the liberal standard and the types of decisions reached in the cases cited, this Court should find that the necessary elements were implicitly contained within the information. There was a correct connection to the underlying offense and conduct. There was a correct reference to statutory authority putting the appellant on notice, and but for the omission of one word, it was a completely correct statement of the statutory aggravating factor. To argue that all of the necessary elements were not implied by the present language would require this Court to view the findings in prior cases, with greater omissions, to be meaningless.

d. The Appellant suffered no prejudice from the omission of the word “stop” from the charging language.

Appellant did not spend much time on the issue of prejudice, except to imply that because of the deficiency of one word, she could not have known she was supposed to defend against the aggravating factor. This argument ignores common sense, and the facts of this case. First, it can be assumed that an information does not contain surplus language, and that if an information contains, directly under a crime charged, in bold and capitalized letters **AGGRAVATING CIRCUMSTANCES**, and then spells forth language that puts you on notice that it relates to dealing drugs in an area related to schools and directs you to an RCW for more specifics, that one should be on notice to take a look. The witness lists in this case contained school district employees on the various witness lists. The examination and cross examination of the school district employee by counsel suggests that he was familiar with, and had perhaps if not cross examined the witness previously, at least interviewed him before questioning in court. VRP 200-201 (cross examination of John Landon).

The other fallacy, as it relates to prejudice, is the ultimate defense of entrapment, which is an affirmative defense requiring capitulation to a crime having occurred, but arguing that the person's will not to commit a crime was overcome by law enforcement. If one is proposing and arguing that a crime took place, but that they would not have committed the crime but for the wrongdoing of law enforcement, what prejudice can be shown by the inartful language issue raised in this appeal? The defense was not that it did or did not occur within 1,000 feet of a school bus route or school bus route stop, rather, it was that the defendant should not be held accountable because they would not have committed the crime but for the acts of law enforcement. The Appellant was not prejudiced in any fashion and any evidence of such prejudice has not been demonstrated.

2. THE MAJORITY DECISION BY THE COURT OF APPEALS DOES NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS.

The sum of Hugdahl's argument in support of the position that there is a conflict between the Court of Appeal's decision and this Court's prior decisions can be found in one paragraph at the end of the brief, where it is maintained that the conflict exists because the Court of Appeals majority decision "...[e]mployed not a 'liberal' interpretation, but instead an *unreasonably* liberal interpretation in order to conclude Hugdahl received adequate notice of the nature of the sentence enhancing allegation against her." Petition for Review at 16. There is no legal support for this argument.

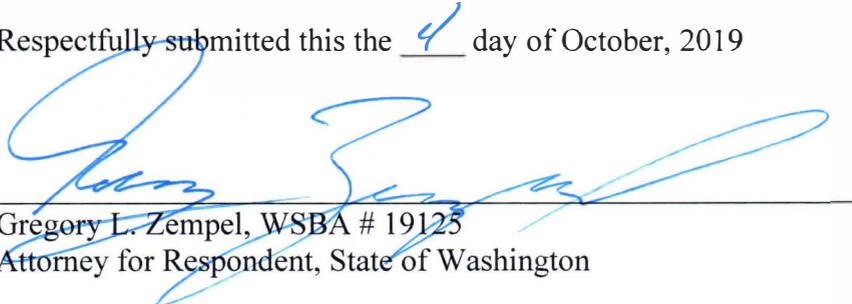
C. **CONCLUSION:**

The Appellant was not denied her constitutional right to present a defense in this case – the defense was presented and the jury did not accept it, choosing instead to convict the Appellant. The Appellant is entitled to a constitutionally sufficient charging document, and the Appellant had a constitutionally sufficient charging document and was properly put on notice on

what she was charged with by the state. It is true that the representatives of the state who worked on the various charging documents never caught the omission of a single word. But it is also clear that within the explicit language of the charging document the necessary elements were satisfactorily put forth. And, should the court find that the necessary elements were not explicitly provided because of the scrivener's error, then the Court should still uphold the sufficiency of the charging document given the liberal interpretation required because the issue was not raised below in a time and manner that would have allowed for correction.

This Court should uphold the convictions and aggravated sentences imposed by a jury and trial judge upon the Appellant. There were many eyes that looked at the charging document and did not catch the omission of the single word. But all were on the same page as to what the charges and aggravators were, as well as the defense, and they all asked witnesses questions that comported with the phrase school bus route "stop" and properly instructed the jury. It is clear from the totality of the circumstances that the Appellant was given proper constitutional notice of the accusations levelled by the state.

Respectfully submitted this the 4 day of October, 2019



Gregory L. Zempel, WSBA # 19125
Attorney for Respondent, State of Washington

PROOF OF SERVICE

I, Gregory L. Zempel, do hereby certify under penalty of perjury that on 4th day of October, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Reply to Petition for Review:

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